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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DocuSys, Inc.¹

Serial No. 76348236

Michael D. Braunstein of Lerner, David, Littenberg,
Krumholz & Mentlik for DocuSys, Inc.

Ronald McMorrow, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Quinn, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

On December 13, 2001, applicant filed the above-
captioned application, by which it seeks registration of
the mark DOCUVIEW (in typed form) for goods identified in
the application as

¹ By change of name from MEDDOC, Inc., recorded on March 28, 2002
at Reel 2481, Frame 0709.

medical system software for controlling the operation and management of medical systems for real time imaging and tracking patients and patient information, drug administration information, surgical procedure status information, and hospital staff and medical equipment throughout the perioperative environment, including electronic displays for visually displaying information, devices for reading machine readable information, and data input devices

in Class 9. The application is based on applicant's asserted bona fide intention to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to applicant's goods, so resembles the mark DOCUVIEW, previously registered (in typed form) for "computer programs for document management and production,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d). The appeal has been fully briefed. Applicant initially requested an oral hearing but later withdrew the request, so no oral hearing was held. We reverse the refusal to register.

² Registration No. 2152721, issued April 21, 1998. Affidavits under Trademark Act Sections 8 and 15 accepted and acknowledged.

The evidence of record on appeal consists of: dictionary definitions of the words "document," "management" and "production," submitted by applicant as exhibits to its response to the first office action; two news releases from the owner of the cited registration, submitted by applicant (Exhibits A and D to applicant's request for reconsideration); printouts of pages from applicant's website, submitted by applicant (Exhibits B and C to applicant's request for reconsideration); printouts of the websites or news releases of six third parties which use DOCUVIEW or variations thereof as marks on or in connection with software products or services, submitted by applicant (Exhibits E-I to applicant's request for reconsideration); and printouts of definitions of the word "document" from three on-line computer dictionaries, which the Trademark Examining Attorney submitted with his brief and of which he requests that we take judicial notice.³ We

³ The three definitions are from Webopedia, FOLDOC, and TISCALI Reference, and were accessed by the Trademark Examining Attorney via the onelook.com website. The Board does not take judicial notice of on-line dictionaries which are not also available in printed format. See *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); compare *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1791 n.3 (TTAB 2002). It does not appear from the record that these three on-line dictionaries also exist in printed format. However, applicant did not object in its reply brief to the Trademark Examining Attorney's submission of the on-line dictionary evidence, but instead has treated it as being properly of record. We therefore shall do likewise.

have given no consideration to the printouts of registrations of various DOCU- marks owned by applicant, which were submitted by applicant for the first time with its reply brief. This evidence is untimely. See Trademark Rule 2.142(d), 37 C.F.R. §2.142(d).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to the second *du Pont* factor, i.e., whether applicant's goods, as identified in the application, are similar or dissimilar to the goods identified in the cited registration. It is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some

manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion; where the applicant's mark is identical to the registrant's mark, as it is in this case, there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

Applying these principles in the present case, we find that applicant's goods are sufficiently dissimilar and unrelated to the goods identified in the cited registration that confusion is not likely, notwithstanding the identical nature of the respective marks in terms of appearance and sound (see discussion *infra*).

It is settled that the likelihood of confusion determination must be made on the basis of the goods or services as identified in the applicant's application and in the cited registration. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). The primary point of contention between applicant and the Trademark Examining Attorney in this appeal centers on the nature of the goods identified in the cited registration, i.e., "computer programs for document management and production." More specifically, the dispute centers on the definition of the word "document" in the registrant's identification of goods. Applicant cites to the following dictionary definition of "document" from The World Book Dictionary (1985) at p. 619: "something written or printed that gives information and can be used as proof of some fact; any object used as evidence." Applicant argues that the registrant's computer programs are used to manage and produce such "written or printed" documents. By

contrast, applicant argues, applicant's medical systems software does not involve the management or production of such written or printed documents, but rather is used to control and manage information, i.e., real time information for tracking patients, drug administration, surgical procedure status and hospital staff and medical equipment throughout the perioperative⁴ environment.

The Trademark Examining Attorney, for his part, argues that the word "document" in the cited registration's identification of goods covers not just conventional printed or written documents but also "any file produced by a software application." He supports this proposition by citing to the on-line dictionary definitions of "document" he has made of record:

document: (n.) In the PC world, the term was originally used for a file created with a word processor. In addition to text, documents can contain graphics, charts, and other objects. Increasingly, the line separating word processing files from files produced by other applications is becoming blurred. ... Consequently, the term document is used more and more to describe any file produced by an application. (Webopedia.)

⁴ We take judicial notice that Stedman's Medical Dictionary (27th ed. 2000), at 1351, defines "perioperative" as "around the time of operation." The Board may take judicial notice of technical reference works such as medical dictionaries and (see *infra*) computer dictionaries. See *In re 3Com Corp.*, 56 USPQ2d 1060, 1061 n.3 (TTAB 2000); see generally TBMP §1208.04 (2d ed., 1st rev. March 2004).

document: Any specific type of file produced or edited by a specific application; usually capable of being printed. E.g. "Word document," "Photoshop document," etc.
(FOLDOC.)

document: Data associated with a particular application. For example, a text document might be produced by a word processor and a graphics document might be produced with a CAD package. An OMR or OCR document is a paper document containing data that can be directly input to the computer using a document reader.
(TISCALI Reference.)

The Trademark Examining Attorney argues:

These definitions clearly show that the term "document" as used in context with the registrant's goods, refers not only to files produced by a word processor, but any file produced by a software application. Therefore, the applicant's claim that the registrant's identification should be limited to "software that deals with conventional documents" is not persuasive. The attached definitions also clearly indicate that the applicant's goods are in fact used for displaying and managing documents. Applicant's goods are used for controlling, managing and displaying patient information, drug administration information and surgical procedure status information. The attached definitions clearly indicate that it would not be inaccurate to refer to this information which is managed by a software application as patient information documents, drug administration information documents and surgical procedure status information documents. In fact, the product description information taken from the applicant's website and entered into the record via the applicant's request for reconsideration filed May 8, 2003 depicts the goods being used to collect and manage information in the form of a document

that is labeled "Electronic White Board." The definitions and evidence of record in this case contradict the applicant's assertion that its goods are not used to create or manage documents.

(Brief, unnumbered pages 4-5.)

We are of the opinion that the Trademark Examining Attorney has accorded an unduly broad scope to the goods identified in the cited registration. We agree with applicant's contention that, if the Trademark Examining Attorney is correct in arguing that the word "document" in the registration's identification of goods should be construed so broadly as to cover "any file produced by a software application," it would render superfluous the language "document management and production" in the identification of goods because, in that sense, virtually all computer application programs produce "files" and therefore produce "documents." Applicant argues that such an interpretation would effectively reduce the registration's identification of goods to "computer programs," an identification which would be impermissibly broad and indefinite under the Office's current examination standards (which require that "computer programs" be

identified with specificity as to both the function/purpose and the field; see TMEP §1402.03(d)).⁵

The Trademark Examining Attorney responds to this argument by citing *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992), in which the Board held that the "computer programs recorded on magnetic disks" identified in the cited registration in that case encompassed all computer programs, including the involved applicant's more specifically-identified "computer programs for data integration and transfer." As the Trademark Examining Attorney has noted, *In re Linkvest* is still good law, notwithstanding the Office's more stringent current requirements for identifying computer programs. See *In re N.A.D. Inc.*, 57 USPQ2d 1872 (TTAB 2000).

However, we agree with applicant's contention that this case is readily distinguishable from *In re Linkvest*. Unlike the "computer programs recorded on magnetic disks" involved in *Linkvest*, which were held to encompass all types of computer programs, the computer programs identified in the cited registration herein in fact are specifically limited in terms of function, i.e., they are

⁵ It appears from the Office's Acceptable Identification of Goods and Services Manual that the Office's more stringent requirements for identifying computer programs took effect on April 12, 1999. The cited registration herein issued in 1998.

computer programs for "document management and production." We take judicial notice that "document management" is a term of art in the computer field which is used to refer to a specific type of software or system, as is evidenced by the following definitions from three computer dictionaries. In Freedman, The Computer Glossary (9th ed. 2001) at 114, "document management" is defined as follows: "The capture and management of documents within an organization. The term used to imply the management of documents after they were scanned into the computer. Today, the term has become an umbrella under which document imaging, workflow, text retrieval and multimedia fall." The "document imaging" to which this definition refers is defined, in turn, as

The online storage, retrieval and management of electronic images of documents. The main method of capturing images is by scanning paper documents. Document imaging systems replace large paper-intensive operations. Documents can be shared by all users on a network and document routing can be controlled by the computer (workflow). The systems are often simpler to develop and implement than traditional data processing systems, because users are already familiar with the paper documents that appear on screen.

Likewise, in Pountain, The New Penguin Dictionary of Computing (2001) at 145, "document management system" is defined as

A computerized system for storing large volumes of documentary material, such as used by large corporations and government departments to keep their archives. If the documents are already in electronic form, they may be put into a text retrieval system that enables indexed searches, or they may be transcribed into some standard notation such as SGML for uniformity of formatting. Documents not already in electronic form may be scanned and turned into editable, searchable computer text by using optical character recognition (OCR), or else stores as bitmap images if they are handwritten or otherwise unsuitable for OCR. In the latter case the document management system normally provides some means of annotating each image to help in retrieving them.

Finally, The Microsoft Computer Dictionary (5th ed. 2002) defines "document management" as "the full spectrum of electronic document creation and distribution within an organization," and "document management system" (in relevant part) as

A server-based network facility designed for the storage and handling of an organization's documents. A document management system, or DMS, is built around a central library known as a repository and typically supports controlled access, version tracking, cataloging, search capabilities, and the ability to check documents in and out electronically.

Moreover, several of the third-party websites printed out and submitted by applicant likewise refer to "document management" products as a specific type or field of

products. For example, the website of Albatross Consulting includes the following language:

Document Management Range

Our range of document management products incorporates three separate products, targeted at all levels of user from the home user to the large corporation. ...

The Document Reader

The entry level product. It is capable of reading up to 200 file formats (depending on licensing), as well as viewing the markup files created by the other products in the range.

Document Markup

The same basic product as the reader, but with the added ability to create markup files and perform batch printing and plotting.

Document Manager

Built around the same technology as the other products in the family, the Manager incorporates many functions required [by] drafting houses and large corporations alike. It not only views and prints files, it also stores them in a database, keeps multiple versions, allows users to search on specific (user-defined) attributes of the documents, handles notifications related to document changes, and much more.

Another website of record (www.scansolutions) refers to the company's DocuView TIFF viewer as follows: "DocuView is a powerful TIFF viewer, [an] image viewer specially designed for integration with existing applications and databases to add document imaging, document management or extensive image viewing capabilities."

It is apparent from these dictionary definitions and this Internet evidence that the word "document," when used in the context of "document management," is not understood to refer to "any file produced by a software application," as the Trademark Examining Attorney argues. Rather, the term is used and understood in its more specific and conventional sense, i.e., to refer to discrete, self-contained documents or images of documents, albeit electronic, which can be archived, retrieved, modified, printed out, transmitted, and otherwise used or manipulated by means of document management software or systems.⁶

⁶ We note that registrant's press releases describing its software, made of record by applicant, corroborate our finding that "document management" software, as that term is used in registrant's identification of goods, appears to have the meaning we have ascribed to it. See, for example, the press release submitted as Exhibit A to applicant's request for reconsideration, in which the following headline and relevant illustrative text appears:

DocuCorp Introduces DocuView 3.0, Expanding Viewing Of Archived Documents

...
"Image file viewers frequently use font substitution technology and are not capable of displaying a document that looks just like the original," he explained. "We support the fonts and other resources used in printstream files, so that what you see on the screen is what was or would have been printed. Fidelity to the original document is extremely important in many viewing applications such as legal documents."

...
Other powerful elements include extensive annotation features: highlighting, stick-on notes with text, empty and filled rectangles, free text, freehand drawing, and virtual "rubber stamps" for both text and

Having thus determined that the goods identified in the cited registration cover a specific type of software, i.e., document management software, we further find that applicant's software, as identified in the application, is neither encompassed by registrant's identification of goods nor sufficiently related to registrant's software that confusion is likely to result from use of the mark DOCUVIEW on both products. Applicant's software, as identified in the application, does not involve the management and production of "documents" as that term is used and understood in the context of "document management" software. Rather, as is apparent from the language of the

images, Andereck added. Annotations can be sized and manipulated individually, and allow selection of color, transparency, font style, and line width. Annotations, which can be displayed or hidden, are stored separately from the underlying print files, so print files are never modified.

We have considered this evidence not for the purpose of limiting or restricting the scope of registrant's goods; as noted *supra*, our likelihood of confusion determination must be based on the goods as they are identified in the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, supra*. Rather, because the Trademark Examining Attorney has based his argument in large part on his expansive reading of registrant's identification of goods (and has contended that applicant's argument is based on an unduly narrow reading of that identification of goods), we find that registrant's press releases, along with the dictionary and Internet evidence discussed above, are probative evidence to be considered in ascertaining the common commercial meaning of the words "document management" in registrant's identification of goods. See *In re Continental Graphics Corp.*, 52 USPQ2d 1374 (TTAB 1999); *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990).

identification of goods, applicant's software is used "for controlling the operation and management of medical systems for real time imaging and tracking of patients" and various types of information throughout the perioperative environment.⁷

This basic difference in the nature and function of the respective goods also informs our analysis, under the first *du Pont* evidentiary factor, of the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. Although applicant's mark is identical to the cited registered mark in terms of appearance and sound, the marks have different connotations as applied to the respective goods identified in the

⁷ The Trademark Examining Attorney, relying on statements contained on applicant's website, argues that applicant's software in fact is used to produce "documents" to the extent that it is "used to collect and manage information in the form of a document that is labeled 'Electronic White Board'." We are not persuaded. There is no evidence in the record showing what a non-electronic "White Board" is, but we presume, from the depiction of the "electronic white board" on applicant's website, that it is a dry-erase board (similar in function to a chalkboard) upon which the operating room's schedule for the current work shift (identifying patients, procedures to be performed, the operating room in which they are to be performed, and hospital staff assignments) is displayed. Given its temporary nature, we cannot conclude that the "white board," even in its non-electronic manifestation, is a "document," or that because applicant's software allows for display of an "electronic white board," it thereby is used for "document management and production," within the meaning of the goods identified in the cited registration.

application and in the registration. DOCU, in registrant's mark, connotes the noun meaning of "document," and registrant's mark, as applied to registrant's document management software, connotes the viewing of documents. In applicant's mark and as applied to applicant's goods, by contrast, DOCU connotes the verb meaning of "document" i.e., the software is used to "document" the activities and status of patients, medical staff and equipment in the perioperative environment. VIEW, in applicant's mark, connotes not the viewing of documents, but rather the viewing of the results of the software's documentation of activities and status in real time.

Further supporting a finding of no likelihood of confusion in this case is applicant's evidence, pertinent to the sixth *du Pont* factor (i.e., the number and nature of similar marks in use on similar goods) showing that DOCUVIEW or some variant thereof is used by at least six third parties as a mark for document management software products which are similar or related to registrant's software. As applied to document management software, the mark DOCUVIEW is rather highly suggestive in its own right; such suggestiveness is corroborated by this evidence that it is used by many others in the field. We cannot conclude that registrant's mark is a particularly strong mark, and

we certainly cannot conclude that the scope of protection to be accorded it extends so far as to preclude applicant's registration of the mark for applicant's distinctly different goods.

Finally, and further weighing against a finding of likelihood of confusion, is the sophistication of purchasers and the care with which applicant's goods would be purchased. As a general rule, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. It is well-settled that one such set of circumstances is in the field of goods and services purchased and used by hospital and medical personnel. See, e.g., *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992); *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985); and *Hewlett-Packard Co. v. Human Performance Measurement Inc.*, 23 USPQ2d 1390 (TTAB 1991); see also *Astra Pharm. Prod., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983). In this case, applicant's software will be purchased

and used by hospital and medical professionals. Moreover, because the software is to be used in the perioperative environment where concerns for the patient's safety are paramount, it is likely that the decision to purchase the software will be made with care.

In summary, it is settled that "[w]e are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." *Electronic Design & Sales v. Electronic Data Systems, supra*, 21 USPQ2d at 1391. For the reasons discussed above, we find that the evidence of record does not support a finding that there is a likelihood, as opposed to merely a theoretical possibility, of confusion. That is, we find that although applicant's and registrant's respective goods are both software products, they perform distinctly different and unrelated functions; that applicant's goods will be purchased by careful, sophisticated purchasers; that the mark DOCUVIEW, although identical in terms of appearance and sound, has a different connotation and overall commercial impression as applied to applicant's and registrant's respective goods; and that, as applied to registrant's goods, the mark is highly suggestive

and not entitled to an overly broad scope of protection, especially given the evidence of third-party uses of similar marks on similar goods. Thus, based on this record, we conclude that there is no likelihood that the relevant purchasers will be confused as to the source or sponsorship of applicant's and registrant's respective goods, even if they both are sold under the mark DOCUVIEW.

Decision: The refusal to register is reversed.